Filed 8/9/10 P. v. Guilford CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM GUILFORD, Defendant and Appellant.	B219575 (Los Angeles County Super. Ct. No. BA357801)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed.

Cristina G. Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Lance E. Winters, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant William Guilford pleaded no contest to possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). The trial court placed defendant on probation under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, for 12 months under various terms and conditions. (Pen. Code, § 1210.1) On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence. (Pen. Code, § 1538.5.) We affirm.

BACKGROUND

The following facts were taken from the hearing on defendant's suppression motion:

Los Angeles Police Department Officer Jonathan Kincaid testified that about 8:00 p.m., on June 15, 2009, he and his partner, Officer Gonzalez, went to 1738 West 67th Street in Los Angeles in response to a call of "domestic violence restraining order violation." On cross-examination, defense counsel played a recording of the dispatch call for Officer Kincaid. Officer Kincaid did not hear anything on the recording about "domestic violence" or a restraining order. Instead, the call concerned a "domestic dispute."

When the officers arrived at the property, they first contacted defendant and not defendant's wife, who was the reporting party. When the officers contacted defendant, they did not have their guns drawn. Officer Kincaid testified that domestic violence is a "major red flag" for officers and, for officer safety, officers always pat down "every person when it deals with domestic violence." Officer Kincaid informed defendant that they were there for a "domestic violence issue incident," and asked defendant if he could pat down defendant for weapons. Defendant replied, "Oh, yeah. Sure. Yes."

Officer Kincaid asked defendant to place his hands on top of his head. Officer Kincaid did not feel anything "significant" as he patted down defendant. During the pat down search, Officer Kincaid asked defendant if he had any contraband or weapons on his person. Defendant responded that he had a "pipe, which is a smoking pipe." Officer

Kincaid detained defendant pending further investigation. On cross-examination, Officer Kincaid was equivocal as to whether he assumed that defendant had a cocaine pipe or an illegal pipe as opposed to a tobacco pipe.

Officer Kincaid patted down defendant a second time. During the second pat down search, Officer Kincaid recovered a glass smoking pipe from defendant's right front pants pocket that he recognized as a "crack" pipe. Officer Kincaid stated he did not place defendant under arrest, but continued to detain him. Based on finding the pipe, Officer Kincaid continued his search and recovered from defendant's pocket a bag containing an off-white rock-like substance resembling cocaine base and a vial that appeared to contain rock cocaine. Officer Kincaid did not ask defendant for permission to conduct a second pat-down search or to go inside defendant's pocket.

Defendant testified in his own behalf that two officer contacted him. The officers drew their guns and told defendant to turn around and put up his hands. Defendant complied. One officer held defendant's hands while the other officer searched defendant. Neither officer asked defendant for permission to search. One of the officers asked defendant whether he had any weapons. Defendant said, "No." Defendant did not tell the officer that he had a pipe on his person. Defendant testified that the pipe was in his pants pocket. The "vial and the object that appeared to be cocaine" were not in that same pocket.

Defendant filed a motion to suppress evidence under section 1538.5. The factual basis for defendant's motion was that defendant's wife had called 911 to report a verbal argument and that she told the police that she had not been hit and there were no weapons. The police searched defendant without consent and found a pipe and cocaine base. After the hearing set forth above, the trial court denied defendant's motion. The trial court found that the officers had a reasonable suspicion that defendant had violated the law causing his wife to call the police. The trial court further found that defendant consented to the pat down search and the officers were "entitled" to retrieve the pipe from defendant. The trial court stated, "I also find that in this case they asserted that – they asked for his consent. I believe the officer was credible on that issue that there was,

in which case, I believe, the pat down was justifiable on both bases having asked him whether he had a pipe and him admitting it. I believe they were entitled to retrieve the pipe."

DISCUSSION

Defendant contends that the trial court erred in denying his section 1538.5 motion to suppress the pipe and cocaine base. Defendant contends that the officers did not have a "reasonable need" to conduct a pat down search in the first instance and that the subsequent search of his pants pocket was intrusive and unreasonable under the Fourth Amendment.

Relevant Legal Principles

1. Standard of Review

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362; (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.)

2. The Initial Pat Down Search

"The Fourth Amendment protects an individual's reasonable expectation of privacy against unreasonable intrusion on the part of the government. A warrant is required unless certain exceptions apply, including the exception that permits consensual searches. [Citations.])" (*People v. Jenkins, supra,* 22 Cal.4th at p. 971.) A police officer also may conduct a pat down search for weapons when the officer reasonably believes that he is dealing with an armed and dangerous individual. (*Terry v. Ohio* (1968) 392 U.S. 1, 27.) A party may consent to a pat down search. (See *United States v. Drayton* (2002) 536 U.S. 194, 199-200.) Consent to search must be voluntary. (*People v. Jenkins,*

supra, at p. 973.) Whether consent was given voluntarily or was the product of coercion on the part of the searching officers is a question of fact to be determined from the totality of the circumstances. (*Ibid.; People v. Shandloff* (1985) 170 Cal.App.3d 372, 383.) The People have the burden of proving that a defendant's manifestation of consent was the product of his free will and not the submission to an express or implied assertion of authority. (*People v. Shandloff, supra,* 170 Cal.App.3d at p. 383.)

Defendant argues that the initial pat down search did not fall within terms of *Terry v. Ohio, supra,* 392 U.S.1 because there was no evidence that would support a reasonable belief that he was armed and dangerous. According to defendant, when the officers arrived, he and his wife were not engaged in an altercation, he was not holding a weapon, he was not acting in an aggressive manner, and he complied with the officers' requests. Even if the facts did not permit a pat down search for officer safety under *Terry v. Ohio,* Officer Kincaid's pat down search did not violate the Fourth Amendment because substantial evidence supports the trial court's finding that defendant consented to the search. At the suppression hearing, Officer Kincaid testified that he asked defendant if he could pat down defendant for weapons and that defendant responded, "Oh, yeah. Sure. Yes." When supported by substantial evidence, we defer to the trial court's findings of fact. (*People v. Jenkins, supra,* 22 Cal.4th at p. 969.) Officer Kincaid's testimony, which the trial court found credible, was substantial evidence supporting the trial court's finding that Officer Kincaid asked for permission to pat down search defendant and that defendant granted his permission. Defendant's consent to being searched validated the search under the Fourth Amendment. (*Id.* at p. 971; see *United States v. Drayton, supra,* 536 U.S. at pp. 199-200.) Moreover, as respondent states, no evidence was discovered during this initial pat down search.

2. The Second Pat Down Search and Search of Defendant's Pockets

A search under *Terry v. Ohio, supra,* 392 U.S. 1, "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." (*Terry v. Ohio, supra,* 392 U.S. at p. 26; *People v. Avila* (1997) 58 Cal.App.4th

1069, 1075.) If such a search exceeds the scope of what is necessary to determine if the suspect is armed, the search is no longer valid. (*People v. Avila, supra*, 58 Cal.App.4th at p. 1075.)

When, as here, the police conduct a search without a warrant, the burden is on the prosecution to establish that the search was justified by an exception to the warrant requirement. (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) A search incident to a lawful arrest is an exception to the search warrant requirement. (*Chimel v. California* (1969) 395 U.S. 752, 762-763.) An officer has probable cause to arrest when presented with facts that would lead a reasonable officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that a crime has been or is being committed. (*People v. Avila, supra*, 58 Cal.App.4th at p. 1075.) When an officer has probable cause to arrest a suspect, a warrantless search becomes justified as a search incident to arrest and the officer may thoroughly search the suspect. (*Ibid.*)

"'When [a] detention exceeds the boundaries of a permissible investigative stop, the detention becomes a de facto arrest requiring probable cause.' [Citations.]" (*People v. Gorrostieta* (1993) 19 Cal.App.4th 71, 83.) "[O]nce you search someone for contraband, based on probable cause etc., you have effectively 'arrested' them for purposes of the Fourth Amendment. There are no magic words necessary. Normally, if the strong suspicion of illegal activity proves unfounded, the individual is released. The subject of arrest does not arise. That person was, however, for the brief period of the search, 'arrested' in the eyes of the law. That is the nature of the term de facto – 'in fact, indeed, actually.' (Black's Law Dict. (4th ed. 1951) p. 479.)" (*Id.* at p. 84.)

Defendant contends that his statement to Officer Kincaid that he had a pipe in his possession did not justify a search into his pockets because people routinely use pipes to smoke tobacco or other legal substances, and it was thus unreasonable for Officer Kincaid to assume he possessed illegal contraband based on his possession of the pipe. Defendant further contends that even if Officer Kincaid's initial pat down search was justified for officer safety reasons, Officer Kincaid's subsequent search of his pockets exceeded the scope of that justification because the incriminating character of any object

in defendant's pocket was not immediately apparent to Officer Kincaid who found nothing "significant" during the initial pat down search. In response, respondent contends that the trial court properly denied defendant's suppression motion because the search was incident to a lawful arrest.

Defendant's statement to Officer Kincaid that he had a pipe in his possession was in direct response to Officer Kincaid's inquiry whether defendant had contraband or weapons on his person. Thus, Officer Kincaid did not have to assume, reasonably or otherwise, that defendant possessed illegal contraband based on defendant's possession of the pipe because defendant admitted as much. Officer Kincaid did not search defendant's pockets because he felt an object during the initial pat down search that he believed was incriminating. Officer Kincaid performed the second pat down search and searched defendant's pockets based on defendant's representation that he was in possession of contraband in the form of a pipe. Having recovered the "crack" pipe, Officer Kincaid continued his search, finding the cocaine base.

Defendant's admission that he possessed contraband established probable cause to arrest him for possession of paraphernalia used for smoking a controlled substance. (Health & Saf. Code, § 11364, subd. (a).) When Officer Kincaid searched defendant, based on such probable cause, defendant's detention became a de facto arrest and, effectively, defendant was arrested for purposes of the Fourth Amendment. (*People v. Gorrostieta, supra,* 19 Cal.App.4th at pp. 83-84.) Defendant's search incident to his arrest was permissible as an exception to the Fourth Amendment's warrant requirement. (*Chimel v. California, supra,* 395 U.S. at pp. 762-763; *People v. Avila, supra,* 58 Cal.App.4th at p. 1075.) Defendant cites *Knowles v. Iowa* (1998) 525 U.S. 113, 114-116, in which the court held that a citation for speeding did not justify a full search of the car. That case is not applicable, for here defendant was not in a vehicle and was under arrest.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.